IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARK OSHINSKIE, Plaintiff, v. JAMIE O'GRADY, JOHN DOE, THE CAULDRON, INC. t/a *THE CAULDRON SPORTS ILLUSTRATED*, and TIME, INC., Defendants.	:	CIVIL ACTION NO. ___________________

PLAINTIFF'S CIVIL ACTION COMPLAINT

1. This is an action pursuant to 17 U.S.C. § 501 *et seq.* seeking redress for the defendants' unauthorized derivative use of plaintiff's copyrighted material and for related state law claims.

JURISDICTION

2. This action is brought pursuant to 17 U.S.C. § 501. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1338(a) and the aforementioned statutory provision. Plaintiff further invokes the supplemental jurisdiction of his Court under 28 U.S.C. § 1367(a) to adjudicate state law claims.

PARTIES

3. Plaintiff, Mark Oshinskie, is an individual and resident of the State of New Jersey.

4. On information and belief, defendant, Jamie O'Grady, is an individual and resident of the State of North Carolina.

5. On information and belief, defendant, The Cauldron, Inc. t/a The Cauldron Sports Illustrated, is a corporation formed and existing under the laws of the State of New York and doing business throughout the United States, including in this district.

6. The Cauldron Sports Illustrated is an on-line publication, which expressly identifies itself as a Sports Illustrated publication.

7. On information and belief, defendant, Time, Inc., is a corporation formed and existing under the laws of the State of New York and doing business throughout the United States, including this district. At all times relevant hereto, Time, Inc. has been the publisher of Sports Illustrated.

8. On information and belief, defendants are subject to both specific and general personal jurisdiction in this district as defendants' publications are marketed and sold in this district and defendants solicit readers, customers and advertisers in this district and derive revenue from their business operations in this district.

9. At all times relevant hereto, defendant O'Grady was the managing editor of defendant The Cauldron Sports Illustrated.

10. At all times relevant hereto, defendant John Doe, whose name and state of residence are unknown, was an editor for The Cauldron Sports Illustrated who aided in the production of the Infringing Article.

11. At all times relevant hereto, The Cauldron Sports Illustrated and Time, Inc. have shared a formal, commercial affiliation and/or partnership, which monetarily benefits both The Cauldron Sports Illustrated and Time, Inc. Alternatively, Time, Inc., through its on-line publication of Sports Illustrated, was the publisher of The Cauldron Inc. At all relevant times, The Cauldron Sports Illustrated listed its website as http://thecauldron.si.com.

12. The individual defendants at all times acted within the course and scope of their employment and as agents of The Cauldron Sports Illustrated and Time, Inc.

13. The corporate defendants at all times acted by and through their agents and employees, including the individual defendants.

FACTS

14. Plaintiff is the author of the article titled, "How I Learned to Hate the Bomb: End the Three Point Shot in Basketball." (Hereinafter "Article"). A copy of the Article is appended hereto as "Exhibit A."

15. Plaintiff originally published the Article on December 1, 2015, utilizing the Medium.com on-line publishing platform. Plaintiff timely registered his work with the United States Copyright Office with such registration issuing on February 10, 2016. A copy of the Registration Certificate Number TX 8-190-785 is appended hereto as "Exhibit B."

16. On or about December 2, 2015, defendant O'Grady, on behalf of his publication, The Cauldron Sports Illustrated, initiated e-mail contact with plaintiff and asked plaintiff for permission to republish the Article to a purportedly wide audience.

17. In order to induce plaintiff Mr. Oshinskie to grant permission for The Cauldron Sports Illustrated to republish the Article, defendant O'Grady expressly promised and represented to plaintiff that plaintiff would retain all rights over the Article, (including the right to forbid unauthorized derivative works) and that, if O'Grady or other staff members of The Cauldron Sports Illustrated edited the Article, they would send the Article back to plaintiff for his approval before it would be published under The Cauldron Sports Illustrated banner.

` 18. The Cauldron Sports Illustrated's writer information page also pledged to writers that before publishing any article a writer has submitted, The Cauldron Sports Illustrated staff would share with writers any changes its editors might make. A copy of this page is attached as "Exhibit C."

19. In reliance on defendants O'Grady and The Cauldron Sports Illustrated's promises, plaintiff submitted the Article for publication by defendants.

20. Between December 2 and 15, 2015, contrary to defendants' promises and representations, defendants, including The Cauldron Sports Illustrated, defendant O'Grady, John Doe and/or other unknown individuals and agents of defendants, acting within the course and scope of their employment at The Cauldron Sports Illustrated, performed the following acts:

1) substantially revised the Article;

2) substantially revised the Article in a manner offensive to plaintiff by: deleting important content in the original Article, adding to the Infringing Article content that distorted or contradicted central themes of the original Article and by adding quotes and other language that plaintiff never expressed because they were not within plaintiff's sphere of knowledge. Collectively, these changes lowered the quality of thought and writing in plaintiff's original Article and would cause The Cauldron Sports Illustrated readers to incorrectly identify plaintiff as a devoted basketball fan and spectator, instead of as an active participant and athlete.

3) intentionally failed and refused to send the substantially revised Infringing Article back to plaintiff for his approval prior to publication;

4) published the substantially-revised Infringing Article in The Cauldron Sports Illustrated under the title "How I Learned to Hate the Three-Point Shot: The NBA's love affair with the deep ball has gone too far" (hereafter "Infringing Article"). A copy of the Infringing Article is appended hereto as Exhibit "D";

5) published the Infringing Article without the plaintiff's permission;

6) published the Infringing Article without notifying plaintiff;

7) utilized plaintiff's name, without notice or permission, in conjunction with the publication of the substantially-revised Infringing Article;

21. Approximately one week after the defendants published the Infringing Article under The Cauldron Sports Illustrated banner, plaintiff discovered the Infringing Article on-line.

22. Plaintiff immediately and repeatedly requested that defendants remove the Infringing Article from The Cauldron Sports Illustrated and cited the agreement not to publish the Article without plaintiff's review and approval.

23. In an e-mail response, defendant O'Grady mocked plaintiff, told plaintiff he was surprised that plaintiff could tie his own shoes and told plaintiff to "G[et] T[he] F[uck] O[utta] H[ere]."

24. Defendants' publication of the Infringing Article constitutes an unauthorized derivative use of plaintiff's copyrighted work.

25. Defendants' infringement of plaintiff's copyright was willful as evidenced by: the number of changes made to the Article, defendants' addition of new material in the Infringing Article, defendants' false representations and promises made to induce plaintiff to submit the Article for republication by defendants, defendants' reneging on these promises and representations, defendant O'Grady's subsequent repudiation of these promises and representations, and defendant O'Grady's hostile and unrepentant response to plaintiff.

FIRST CAUSE OF ACTION
COPYRIGHT INFRINGEMENT UNDER 17 U.S.C. §501, *et seq.*

Plaintiff v. All Defendants

26. The averments set forth at paragraphs 1 through 25, inclusive, are incorporated by reference as though set forth fully herein.

27. Defendants intentionally and willfully infringed plaintiff's copyright by publishing an unauthorized derivative version of plaintiff's copyrighted work without plaintiff's consent or approval.

28. Plaintiff is entitled to recover from defendants the gains, profits and advantages defendants obtained as a result of their infringement of plaintiff's copyright.

29. Alternatively, plaintiff is entitled to recover statutory damages in an amount up to $150,000.00.

SECOND CAUSE OF ACTION
MISAPPROPRIATION OF NAME OR LIKENESS
MISCHARACTERIZATION OF PLAINTIFFS' PERSPECTIVES AND IDENTITY
DEFAMATION

Plaintiff v. All Defendants

30. The averments set forth at paragraphs 1 through 29, inclusive, are incorporated by reference as though set forth fully herein.

31. Defendants appropriated to their own use plaintiff's name in conjunction with the publication of the Infringing Article.

32. Plaintiff would not have allowed the Infringing Article to be published with his name attached to it because the Infringing Article: misstated plaintiff's views, deleted paragraphs and other ideas central to plaintiff's message, added language and ideas that plaintiff did not use,

thereby incorrectly portraying plaintiff as a devoted basketball fan and spectator, instead of as a participant/athlete, and lowered the quality of thought and writing in plaintiff's original Article.

33. As a result of these effects of the Infringing Article, and because defendants attributed to plaintiff the Infringing Article, plaintiff has suffered damages, including embarrassment and harm to his reputation.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT
FRAUD IN THE INDUCEMENT

Plaintiff v. Defendants O'Grady, The Cauldron Sports Illustrated and Time, Inc.

34. The averments set forth at paragraphs 1 through 33, inclusive, are incorporated by reference as though set forth fully herein.

35. Plaintiff entered into an agreement with the defendants whereby plaintiff allowed defendants to use his story only after plaintiff's review of any edits by defendants.

36. Pursuant to said agreement and representations, plaintiff provided his article to defendants.

37. Despite their promise to allow plaintiff to review any edits before publication, defendants did not share their revisions with plaintiff and instead posted the Infringing Article.

38. For the reasons stated in Paragraphs 32 and 33, supra, Plaintiff would not have allowed the Infringing Article to be published under his name.

39. The Infringing Article remained posted until plaintiff discovered it on The Cauldron Sports Illustrated site after it had been posted in significantly changed form.

40. Therefore, defendants used false pledges to induce plaintiff to submit the article and breached the subject contract with plaintiff.

RELIEF

WHEREFORE, plaintiff prays for judgment against defendants as follows:

a. For entry of judgment against defendants for all damages as to which plaintiff may be entitled, including defendants' profits and damages, embarrassment, humiliation, mental distress and harm to reputation in an amount as may be proven at trial. Alternatively, at plaintiff's election, for the maximum statutory damages allowed by law for defendants' copyright infringement or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c);

b. For pre-judgment and post-judgment interest according to law;

c. For plaintiff's attorneys' fees, and full costs and disbursements in this action; and

d. For such other relief as the Court may deem proper and just.

Demand for Jury Trial

Pursuant to Federal Rule of Civil Procedure 38(b), plaintiff demands a trial by jury of all issues triable by right of jury.

Respectfully Submitted,

Date: May 23, 2017

By: s/ Randy T. Pearce

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